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"JUSTICE IS THE GREATEST INTEREST OF MANKIND ON EARTH"—A PLEA TO THE PRESIDENT AND CONGRESS.

In these columns we have earnestly advocated a militant patriotism, an intense work of preparation and a fervent spirit of unselfish service, that the war may be carried on to a quick and victorious end. That maximum results may be obtained from individual effort, there has been advocated the organization by the lawyers of a mobilized Civilian Army composed of every loyal American citizen. Energy would thereby be intelligently directed and applied and the most beneficial service obtained in that part of the war that must be carried on at home. The lawyers are the manifest leaders in such a work.

But in stopping the spigot of misapplied energy and lethargy we would not be understood as wishing to condone a continued loss of faith at the bung. If our sentiments meant anything, they expressed the importance of awakening the individual spirit of America to a realization of personal duty. That in the present dastardly thrust against orderly representative government, that was constituted to protect right against might, and the pole star of which is justice, appears an open threat of Prussian tyranny over the world. Prussian success means American disintegration. For this reason the fighting of this war ought to be the business and the inspiration and hope of all lovers of liberty, however small a part each person may perform.

It is this vital thought the lawyers will carry to the people. But a very practical element injects itself at this juncture that will confront the lawyers on every platform. It is the failure to improve the administration of justice in the courts. Congress has failed to modernize and simplify the procedure of the courts in the face of an insistent popular demand. Leading American authorities, including President Wilson and ex-President Taft, the American Bar Association and forty-five State Bar Associations, are upon record that present juridicial conditions do not justfy popular faith in or respect for the courts, or their creators. All the national civic and industrial organizations have called for relief.

The government has acted as if it considered the administration of justice a minor affair, to be continually put to one side. Is history repeating itself? Daniel Webster said, "Justice is the greatest interest of mankind on earth." It is a dangerous element to be the victim of official indifference at any period but, particularly, at such a time as this, when everything proper ought to be done to make men feel satisfied with and proud of their government.

Does there rest upon Congress at this time a higher duty than an earnest endeavor to inspire in the people full faith in the courts and in itself? It is from the people that it is proposed to draft both a Military and a Civilian Army. It is these millions of earnest men who are willingly offering up their comfort, their fortunes and their time at the call of the President and the Congress, and who want to feel in their hearts that all is well at home.

The real feeling and spirit of the American people may be found by the President and Congress in the thousands of demands for better courts and for simplified procedure, and in the President's own logical and eloquent statements. Year by year, they have repeated complaints and petitioned for relief. One of two inevitable ends await. Their spirit will either grow weary or resentful. Both attitudes are a menace to both the government and a martial spirit.

Now, the lawyers will momentarily forget the lack of respect shown by Congress to the petition for the simplification of a court procedure that has sorely reflected on their standing and has deterred their efforts at greater public usefulness. *They will do more.* They will forget that one Senator, himself a lawyer, in an official capacity,

charged them with sinister and selfish motives, in this unselfish effort.

But will the people forget? That is the material issue! For five years the lawyers, in self-defense as well as in a patriotic effort to achieve a needed governmental reform, have carried on a dignified, but intense campaign of education, known to every member of Congress. Will the lawyers in their proposed campaign of war work be able to prevent reference to their disappointment in so vital a public matter? No intelligent man can be unmindful that the bill giving the Supreme Court power to make and revise rules of procedure, having been recommended by the Judiciary Committees of both Houses, needs only to be brought to a vote. A majority have expressed a desire to vote for it.

Lest we forget, it was only three years ago that the recall of judges and of judicial decisions claimed nation-wide partisans. This dangerous political expedient was allayed by the explanation of the American Bar Association that the trouble was misunderstood, and its assurance of substantial correction by approved legislation, then pending in Congress. *This is the legislation that has not been enacted into law.*

The President and the Congress are earnestly petitioned to send the lawyers into battle equipped with the greatest of all arms —with spirits charged with the enthusiasm of respect and faith in official Washington, following the achievement of a great reform; and to place them in the position of whole-heartedly defending the government before the people, *by promptly passing the American Bar Association's procedure bill.*

And still another thought. The continued suppression in Congress of the majority voice in favor of this bill is again unloosing the devils of dissatisfaction that were chained up a few years ago by the lawyers after an expensive and intensive campaign. In the sacred name of Justice, help the American Bar Association to keep them chained during these troublous times.

T. W. S.

SEGREGATION ORDINANCES PROHIBITING ACQUISITION OF RESIDENCE PROPERTY BY NEGROES OR WHITES RESPECTIVELY IN CERTAIN BLOCKS IN CITIES.

The U. S. Supreme Court lately has held that a muncipal ordinance providing that a white or a negro may not move into and occupy a residence in a block, as to the former, where a majority of the houses are occupied by negroes, and a negro may not move into and occupy a residence in a block where a majority of the houses are occupied by whites, is discriminatory legislation forbidden by the Fourteenth Amendment. Buchanan v. Warley, 38 Sup. Ct. 16.

The court thus states the question: "May the occupancy, and, necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the states or by one of its municipalities, solely because of the color of the proposed occupant of the premises? That one may dispose of his property, subject only to the control of lawful enactments curtailing that right in the public interest, must be conceded. The question now presented makes it pertinent to inquire into the constitutional right of the white man to sell his property to a colored man, having in view the legal status of the purchaser and occupant."

The way this case came up makes it take on greatly the aspect of a moot question presented for decision of a principle. A white man had a contract to sell a colored man a lot in a block, where the greater number of houses in that block were occupied by white dwellers.

It appears that defendant made an offer in writing to purchase a lot in question "for the purpose of having erected thereon a house which I propose to make my residence, and it is a distinct part of this agreement that I shall not be required to accept a deed to the above property or to pay for said property unless I have the right under the laws of the state of Kentucky and the city of Louisville to occupy said property

as a residence." Having the situation all arranged, the white man brought suit against the colored man for specific performance and he set up the ordinance of Louisville as an excuse for non-compliance. Well may it be thought there would not be any very strenuous endeavor by defendant to show the constitutionality of the ordinance. But the court treats the case as between *bona fide* adversaries. This seems especially true when it is considered, that the defendant lost in the state courts, which, whatever else may be thought, are courts whose judgment would be binding until appealed from and reversed.

But the particularly interesting thing about the decision is what is said about Plessy v. Fergusson, 163 U. S. 537, and the Berea College Case, 211 U. S. 45.

The former of these cases sustained a statute requiring railway companies to provide in their coaches equal but separate accommodations for the white and colored races. It was said "there was no attempt to deprive persons of color of transportation in the coaches of the public carrier." This was held to be a permissible classification.

In the other case a state statute prohibited the attendance at an incorporated educational institution of white and colored students in the same rooms at the same time. The court adopting language of Georgia Supreme Court, said this was not to deny "the right to use, control or dispose of one's property." If it does not put a very severe limitation on the right of use and control of property, it is hard to see what it does do.

Speaking of the genus of such enactments it is said: "It is the purpose of such enactments, and it is frankly avowed it will be their ultimate effect, to require by law, at least in residential districts, the compulsory separation of the races on account of color. Such action is said to be essential to the maintenance of the purity of the races, although it is to be noted in the ordinance under consideration that the employment of colored servants in white families is permitted and nearby residences of colored persons not coming within the blocks, as defined in the ordinance, are not prohibited."

This last clause looks like the court was seeking some special reason for its ruling for unconstitutionality.

Furthermore it is said: "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." But if one has the right to ride where he pleases in a public conveyance, or another has the constitutional right to contract under chartered power to afford education to a colored man, why should the desirable and important thing spoken of interfere, and not be allowed to interfere as to a contract to buy a house and move into it? Why is not the police power as dominant in one as in the other case?

While the ruling may have the support of reason, yet it must be thought that the court does not elaborate so as to present a well-grounded distinction to control the case as not coming under the rulings referred to. If a predominant public opinion can compel a bank to guarantee deposits in other banks, why cannot a like opinion have sway over contracts for the acquisition of property? Especially it may be thought, that the protection of such a thing as racial purity, is, at least, as vital as in the case of association in public carriers and the coeducation of the races. And, furthermore, if the necessary tendency of whites and blacks living in the same blocks is to provoke riots and unlawful assemblies, an insistence upon the right to live where one may choose to live, is freedom to overturn good order in the pursuit of a contract right. Heretofore a contract right has not been declared to rise superior to all police power.

NOTES OF IMPORTANT DECISIONS.

CORPORATION—DEPLETION OF ASSETS BY FORBIDDEN PRACTICES SO FAR AS SUBSEQUENT CREDITORS ARE CONCERNED.—Jesson v. Noyes, 245 Fed. 46, decided by Ninth Circuit Court of Appeals, holds in a suit against directors of a corporation which was forbidden by statute to pay dividends not earned or purchase its own stock, that their liability not only was to existing but subsequent creditors.

The court referred to contention of counsel as being sustained by Atlanta, etc., Assn. v. Smith, 141 Wis. 377, 132 L. R. A. (N. S.) 137, 135 Am. St. Rep. 42, but it says this was because the trust fund doctrine does not under all circumstances there apply and that "as a general rule, unless plainly prohibited by statute or its organic act, a corporation may buy its own stock using its assets therefor, so long as it acts in good faith, pursuant to authorization of its governing body, and that this is true both as to past and future creditors." Then it is stated that the statute governing this corporation expressly forbade such.

Cases are referred to to the effect that if such practices result in immediate insolvency the fact of liability of directors to future creditors is clear, but not so if this does not immediately result.

The court also refers to the case above cited as stating a more far-reaching principle. That case says: "We are not unmindful that the rule, in general, as to avoidance of a transfer of property in fraud for future creditors, applies only in cases of actual intent to defraud them. * * * It is too restrictive, as generally stated, to the situation here, and should it in thought, be extended to include it, upon the theory, that the duty of the stockholders not to deplete for their own advantage corporate assets below the subscribed capital, and become a party to a continuance of solvent appearance, supplies the nced for actual intent to defraud, where the natural and probable effect is to prejudice persons subsequently dealing with the corporation as solvent."

It seems to us, the rule ought to go further than this. If a corporation's subscribed capital is behind its capital at all, it is so utterly. The very fact that it may not reduce its general capital without special authority carries the idea, that it shall not do this indirectly by releasing any stockholder's share in that capitalization. It matters not whether a release affects its solvent appearance or not. If ultimately it does this, this is harmful, if creditors rely on capitalization. If the stock may not advantageously be disposed of in market overt, that is a reason for its not being bought by the corporation. If the corporation wishes to reduce its stock, the same publicity should be given to that fact as is given to original subscription. And before any corporation may reduce its capitalization, there ought to be given opportunity to object by any one interested, or that may be interested.

LANDLORD AND TENANT — LIABILITY OF LANDLORD LEASING LAKE FOR BATHING PURPOSES.—In Bearman v. Grooms, 197 S. W. 1090, decided by Supreme Court of Tennessee, it was held, that where a lake to be used for public bathing purposes was of treacherous and uneven depths, so that it only could be used with reasonable safety by placing ropes between stakes at convenient intervals, and lessee agreed to maintain and to plant posts, maintain guards and boats and take all necessary precautions to make safe the business of a lake for public bathing purposes, the landlord did not become liable for the drowning of a patron, who came into a sharp decline in the bottom, the duty of maintaining the lake in safety being solely on the lessee.

The court said: "The construction of additional appliances or equipment, such as warning signs or guard ropes, required to make the premises suitable and safe for use, being that of the tenant, and any negligence that resulted in their maintenance being also his, the pending case is to be differentiated from those of another class where the manner of construction by the lessor and the tenant's negligence both contribute to the injury of a third person."

We think the error in this view is in not differentiating between conduct of business by the lessee and the leasing to him of unsafe premises.

It is premised by the court that there is a stringent liability in the management of the lake in question for the purpose intended and in holding it out to be used therefor. Now, if the landlord knew there were dangerous depths, hidden from users of the lake, it could not be leased except as a dangerous place. If statute, for example, required guard ropes to be used and posts planted to which they were to be tied, no promise by a lessee to see to this would excuse the lessor. To maintain these things is not an act in the course of conduct of the business. We doubt very greatly that there legally exists the distinction of which the court speaks.

METHODS OF SELECTING JUDGES.

Most people in this country, who think about the subject at all, suppose that there are only two methods of selecting judges —by appointment and by election. This is a fundamental error that we must avoid *in limini*. There is, speaking generally, only one method of selecting judges and that is by appointment. There are, of course, different kinds of appointment, as we shall see, but except, perhaps, in the most primitive frontier communities, there is no such thing as the selection of judges by the people. In metropolitan districts I venture to say that such a method of selection not only does not exist, but cannot by any possibility exist. It is one of our most absurd bits of political hypocrisy that we actually talk and act as if our judges were elected by the people whenever the method of selection is in form by popular election.

In a great metropolitan district like Chicago, for instance, where we have a typical long ballot and the party machines are well organized and powerful, our judges, while they go through the form of election, are not selected by the people at all. They are appointed. The appointing power is lodged with the leaders of the party machines. These men appoint the nominees. They did it openly and with a certain degree of responsibility under the convention system. They do it now less openly and with less responsibility under our compulsory and partisan primary system.

Even outside of such metropolitan districts as Chicago, if party organizations are strong and well led, and the form of elections aid these party organizations, the same process of appointment will be found to prevail, although owing to the smaller sized electorate the confirming of the appointees by the people may be somewhat more intelligent.

In Wisconsin,[1] where they are proud of and satisfied with their so-called elective system of judges, I venture to say that the method of selecting will be found to be ninety per cent appointment and ten per cent election. A strong tradition has been built up in Wisconsin of re-electing sitting judges. This means, and the actual fact is, that vacancies on the bench occur almost wholly by death or resignation of the incumbent. When this happens the bar (and that means the leaders among the bar) at once set about to fill the office. The qualifications of various lawyers are discussed in a semi-public manner. There is sufficient decorum so that candidates do not come forward personally to advance their claims. A bar primary is then held, all the candidates having a fair chance. The bar, as a whole, accepts the result and regardless of party, supports the winner. The actual power of appointment for the unexpired term rests with the governor. He, however, is expected to, and customarily does in fact, appoint the man recommended by the bar. When election day comes around the judge so appointed is supported by the bar regardless of party, because he was originally the nominee of the bar and because he is a sitting judge. He is regularly thereafter supported at elections until he dies or resigns. So strong is the tradition and feeling in favor of electing and re-electing judges who have been appointed originally in the manner described, that sitting judges will prevail even against candidates who are admittedly abler lawyers. The system of retaining judges in office during good behavior has been found by the people of Wisconsin to be worth more than the replacement once in a while of a satisfactory man with one who might and who probably would do better. Whatever pride there may be in such a system of selecting judges, it is a pride in the way a so-called plan of popular elec-

(1) For this account of the way the election of judges works out in Wisconsin, I am indebted to Herbert Harley, Esq., Secretary of the American Judicature Society.

tion has been developed into an appointment by the leading lawyers of the district with the concurrence of the governor. In the largest metropolitan district of Wisconsin however, the lawyers are having harder work to keep in their own hands the power of appointing judges and to prevent that power from passing to the leaders of the political organizations which fill the general run of offices in the district.

A proper analysis of our experience not only shows that there is practically no such thing as the selection of judges by the people, but also that such a mode of selection is (particularly in our larger metropolitan districts) impossible. The plain truth is that in a metropolitan district, and to a considerable degree outside, the selection of judges by some sort of appointing power cannot be avoided. It is obviously impossible for an electorate of any size, or even for different parts of such an electorate, to have any collective idea of those among the lawyers whom it wishes to act as judges. It is even more clear that the electorate can have no collective idea of the qualifications of different lawyers for exercising the judicial function. It would be a problem for a single individual who had an extensive personal knowledge of lawyers and who observed them closely for a considerable period in the practice of their profession.

We have gotten past thinking that any lawyer can be a judge. In metropolitan centers particularly, we have come to the view that to be a successful and efficient judge a highly trained professional expert is required. He must not only be well educated, but he must have the training and character which comes from years of practice in the courts. The electorate would not think of undertaking to select at a general election the engineer who is to design a bridge upon which thousands of the population each day must pass in safety. It is quite as absurd for the electorate to attempt a selection of the very special talents which are required in a judge in passing upon the rights to life, liberty and property of thousands of citizens. Furthermore, lawyers who are willing to become candidates for judgeships have as a general rule no real popular following among an electorate of any size. Few judges, after they have been on the bench, have any such real popular following that they can be said to be a popular choice. The position of a single judge in a district containing one hundred thousand voters and upward is ordinarily too hidden and obscure to enable any man who is willing to occupy the place to secure a popular following. A lawyer or a judge, who secures a real hold upon the majority of a numerous electorate, will inevitably be led to a candidacy for office of greater political importance than a judgeship. These are some of the reasons why the selection of judges by the people is a practical impossibility. For all but the most exceptional judge, particularly in metropolitan districts, the power which places him in office will be an appointing power, although there be in force the so-called popular election of judges.

There are many who sincerely believe that the electorate can choose its judges, provided they are elected only at special elections, where a judicial ballot is used which omits all designation of parties and upon which the names of candidates are placed by petition only and the name of each candidate is rotated upon the ballot so that it will appear an equal number of times in every position. The object of such legislation is to restore a choice by the electorate by depriving the party organizations of predominant influence in judicial elections. The means adopted to deprive the party of its influence is to take from it the use of the party circle and the party column. It may safely be predicted of such legislation that it will not cause judges to be the actual choice of the electorate, nor will it eliminate the influence of the party leaders in judicial elections.

The supposition is that if the influence of the party leaders can be eliminated, the electorate will necessarily make a real

choice. But the electorate does not fail to choose simply because the party leader has taken that choice from it. On the contrary, the party leader rules because the electorate regularly goes to the polls too ignorant politically to make a choice of judges. That ignorance is due to the fact that the office of judge is inconspicuous and the determination of who are qualified for the office is unusually difficult, even when an expert in possession of all the facts makes the choice. The proposed method of election does not in the least promise to eliminate the fundamental difficulty of the political ignorance of the electorate. If, therefore, it succeeded in eliminating the influence of the party organizations the question would still remain: Who would select and retire the judges? There is no reason to believe that the electorate would make any real choice. Electors would be just as politically ignorant as they were before. They would be just as little fitted for making a choice as they were before. The elimination of extra-legal government by party leaders does not give to the electorate at large the knowledge required to vote intelligently. Who, then, will select the judges? The newspapers might have a larger influence, but they would probably be very far from exercising a controlling influence or uniting in such a way as to advise and direct the majority of the voters how to vote for a number of judges. Special cliques would each be too small to control a choice and combinations would be too difficult to make. The basis of choice would, therefore, be utterly chaotic. There could be neither responsibility nor intelligence in the selection of judges. The results reached would depend upon chance or upon irresponsible and temporary combinations. With every lawyer allowed to put up his name by petition and chance largely governing the result, the prospect is harlly encouraging.

There is no reason to believe, however, that any such disorganized method of choice would be tolerated. The most potent single power in elections would end it. That power would be the present type of party organization. It would be put to greater trouble in advising and directing the politically ignorant how to vote, because it would have been deprived of the party circle and party column. But the advice and direction could and would be given and followed. Each party organization would have its slate of candidates. Each would prepare printed lists of its slate to be distributed at the polls and the voter would, for the most part, as now, take the list of that organization he was loyal to or feared the most, and vote the names upon it, no matter where they appeared upon the ballot. Thus the appointment and retirement of judges by the party leaders would, after perhaps a period of chaos and readjustment, again appear. Perhaps it would be even stronger as a result of reaction and deliverance from the chaotic conditions which it relieved.

It is impossible to escape the conclusion that in a metropolitan district with one hundred thousand voters and upward, the selection of judges by the electorate is practically impossible. It is equally certain that the judges in such a community must be selected by some appointing power. It is more and more apparent everywhere that the selection of judges by the electorate is a myth, and that in reality all efforts at election by the people result in the development of some sort of extra legal appointing power. The real and only question therefore becomes: what is the sound principle upon which to create an appointing power and how far do our actual or proposed appointing powers conform to such principle?

There should be no difference of opinion as to the attributes of a proper appointing power. It should be vested directly in a legally constituted authority. That authority should be conspicuous, subject directly to the electorate and in the highest degree interested in and responsible for the due administration of justice.

Judged by this test, appointment by the party organization leaders falls far short of our ideal. It is extra legal, that is, it was not contemplated by those who designed and advocated the elective system. It is not sanctioned by any law or by the constitution. The appointing power in the party organization leaders is not conspicuous, rather is it very obscure—so much so that most people still believe that the application of the elective principle means a choice by the people. The party organization leaders wielding the appointing power have no responsibility for the due administration of justice and the minimum degree of interest in it. Sometimes ugly hints get abroad that particular party leaders are actually interested in securing as judges men who may be relied upon to give special immunity to certain offenders from the criminal law. The motive is very strong on the part of the organization chiefs to reward with an appointment to the bench those who have done more in the way of political service to the organization than in practice in the courts. Finally the appointing power in the party organization leaders is not as directly subject to the electorate as it should be.

Of course, there are some exceptional cases where party leaders have felt their responsibility for good appointments to the bench. These are the shining examples. They are not the rule. It is a mistake, however, to condemn too harshly party organization leaders because of the existence in them of this appointing power. They are not really responsible for its being in their hands. The elective system of selecting judges forces this appointing power upon the party organization leaders. Since selection by the people is impossible, and since we abhor selection by chance and a condition of political chaos, the appointing power gravitates necessarily toward that political organization which stands between the electorate and governmental chaos. The party organization leaders only exercise the appointing power the way it is to be expected that men in their position would. They become blameworthy only when they resist their deprivation of the appointing power and the placing of it in better hands. As far as I know, the party organization leaders have not been presented with any plan which deprives them of the power of appointing judges and the handing of that appointing power over to some better authority, and as far as I know, therefore, they have not yet been placed in a position of opposition to such a movement.

Let me emphasize again that we do not advance toward a better method of selecting our judges when we attempt merely to break down the appointing power of the political party leaders by non-partisan nominations and elections and other election expedients. As we have already seen, the elimination of the power of the political organization leaders does not mean that the people will choose. It means simply chaos due to unintelligent voting on a matter which the voter will not, and therefore we may say cannot, become intelligent about.

It has been suggested that lawyers, acting through bar associations with power over nominations, be given a hand in the exercise of the power of appointment of judges. For instance, the concrete suggestion has been made that the Chicago Bar Association should be given power to place upon the official ballot a bar association ticket upon which might appear candidates who had been nominated by any of the other political parties. This would give the candidates approved by the bar association, and also by any other political party, considerable advantage over those appearing in only one party column. This, however, in spite of the good results obtained in Wisconsin, as a result of appointment by the bar, does not promise much. The responsibility of lawyers is distributed among too many individuals. Furthermore, the lawyers are too much interested in winning cases and often particular classes of cases, for particular clients to be intrusted with power

in the selection of judges. It is undesirable that judges should be so much under the influence of members of the bar as they must be if the lawyers are to have a special influence in the selection of the judge and his continuance in office. In the larger metropolitan districts it may be surmised that the lawyers would very quickly be divided up into groups controlled by the leaders of the political organizations if those leaders determined to keep control of the appointment of judges.

Appointment by the Governor directly, as in Maine, New Hampshire, Massachusetts, Connecticut, New Jersey, Delaware, Florida and Mississippi, or indirectly, by designating nominees to be voted upon, as is now being urged in New York State, is better than appointment by party leaders. It is conspicuous and legal. The Governor is directly responsible to the electorate. It is not, however, an ideal method of appointment. The governor's responsibility for and interest in the due administration of justice is remote. Justice by the court is administered by a department of government kept separate and independent of the executive. The governor can only affect it through his influence with the legislature. In many states it is fair to say that the governor has no responsibility for the way the courts operate. Our state executives are always busy building and keeping in repair a governor's political organization, which is usually separate from the various local political organizations controlling the name of the party to which the governor ostensibly belongs. This building and keeping in repair the governor's political organization is done by appointments to office, and the appointment to judgeships would undoubtedly be used as freely as appointments of heads of the State Insane Asylum and Penitentiary. Furthermore, our state executives have legislative programs and are likely to trade appointments for support in the legislature at a critical moment.

It has been suggested that appointment be by the highest appellate tribunal of the State, the members of which are subject to the electorate. Very likely this would be better than the present method. It might well be better than appointment by the governor, because such a court is more responsible than the executive for the due administration of justice and the members of it have a stronger motive for appointing fit men, as well as an excellent opportunity for determining the character and ability of lawyers. On the other hand, there is danger that the judges of the most important tribunal of the State may become subject to political pressure and incur political animosities by reason of the exercise of the power in question. Furthermore, responsibility for selection is not concentrated.

The least objectionable method of appointment, and the one which promises the most, is that of vesting the appointing power in an elective chief justice who is given large powers over and responsibility for the way in which the court operates. Such an appointing power would be legal and conspicuous to a marked extent. It would be subject directly to the electorate. It would be in the highest degree responsible for the due administration of justice and interested in the efficiency of the court.

The plan is plainly an application of short ballot principles to the judiciary.

A precedent for this method of selecting judges exists in New Jersey. There the chancellor for the State at large, who is appointed by the governor with the approval of the senate, for a term of seven years, is given power to appoint his vice chancellors to the number of seven, each for a term of seven years. This seems to have worked admirably in building up a court with an able and effective corps of judges.*

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*The following extract from the letter of Mr. Charles H. Hartshorne, of Jersey City, N. J., to the author, dated November 4, 1912, explains the plan of administering the chancery jurisdiction in New Jersey: "The constitution

of New Jersey provides that 'The court of chancery shall consist of a chancellor.' The chancellor is appointed by the governor with the approval of the senate, for a term of seven years. He is usually reappointed, though it is an open question whether this office is an exception to the custom that judicial officers of the superior courts shall be reappointed, regardless of their political affiliations, so long as they are capable of giving efficient service. That custom has resulted in our having upon the bench of the higher courts, judges who have served for very long periods—twenty-five years and upwards.

"A number of years ago, the work of the court of chancery having become too great for one judge to dispose of, a statute authorized the appointment by the chancellor alone (without confirmation by any other authority) of a vice-chancellor, as assistant. By further statutes, the number of these was increased to seven. The court now consists of a chancellor and seven vice-chancellors, who sit separately in different parts of the state. The vice-chancellors are appointed for seven-year terms. That bench is generally regarded as the strongest in the state and has given entire satisfaction to the bar and to the public.

"The vice-chancellors hear interlocutory motions in nearly all cases under a standing rule of the court, but they conduct trials and final hearings only upon an order of reference from the chancellor. After trial they write the opinion of the court, which is usually reported, and advise the decree, which is then signed by the chancellor. No appeal lies from their decree to the chancellor, but all such decrees may be appealed directly to the court of errors and appeal.

"Theoretically, the vice-chancellors are merely referees who report and advise the chancellor, the decree being made by him upon their report. In actual practice however, they are members of the court of chancery, in fact (but not in form) making the final decree of that court.

"The system has worked very satisfactorily in respect to the character and attainments of the members of that bench, but the work of the court in populous cities is a good deal in arrear. This is due to the volume of business having outgrown the number of vice-chancellors."

WAR—HABEAS CORPUS FOR MINOR SOLDIER.

In re Petition of Mrs. Henrietta Rush, on behalf of Thomas F. Caldwell, a minor for habeas corpus.

District Court, N. D., M. D., Ala. Nov. 13, 1917.

HENRY D. CLAYTON, District Judge: This application for habeas corpus is filed by Mrs. Henrietta Rush on behalf of her minor grandson, Thomas F. Caldwell, her natural ward whose custody and control she has had, his parents being dead, alleging that he is illegally restrained of his liberty under and by color of the authority of the United States and in violation of the laws of the United States by William R. Smith, Brigadier General, N. A., commanding 37th Division in training at Camp Sheridan, Montgomery, and seeks Caldwell's discharge from the custody of the military authorities.

The facts in the case are not disputed and from them it is established that Caldwell was born September 28, 1899; that on October 13, 1916, while a little over seventeen years of age, but under eighteen years of age and without the consent of his grandmother, his natural guardian, he enlisted in the Alabama National Guard, which, prior to that time, had been mustered into and was then in the service of the United States; that Caldwell went with his Company to the Mexican Border, received the pay and allowances and performed all the duties of a soldier for nearly a year and that with the knowledge of his guardian; that he accompanied his Company to Camp Mills, N. Y., the point of embarkation for France, and that while at Camp Mills and on September 15, 1917, he voluntarily left his company without permission of his commanding officers and returned to his home. Upon his arrival in Alabama, he was apprehended by the military authorities and the return of General Smith to the writ shows, and it is not disputed, that Caldwell is being held by him as a soldier of the United States, that formal charges alleging the crime of desertion have been preferred against him and that Caldwell awaits trial by court-martial.

At the time of Caldwell's enlistment, Section 27 of the National Defense Act, act of Congress approved June 3, 1916, 39 Stat. L. 186, contained the following proviso:

"That no person under the age of eighteen years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians, provided that such minor has such parents or guardians entitled to his custody and control."

It is insisted by petitioner's counsel that this provision quoted renders Caldwell's enlistment void and that although he is held by the proper military authorities on a charge of desertion, nevertheless, the Court should discharge him and award his custody to his grandmother, his guardian.

While it is true that for a time the decisions of the courts varied as to whether the enlistment of a minor in the army or navy without the written consent of his parent or guardian,

and in view of the statutes of the United States prohibiting the same, was void or only voidable, the question was settled more than twenty-five years ago by the decision of the Supreme Court of the United States in re Morrisey, 137 U. S. 157, construing a provision identical with Section 27 of the National Defense Act, except the age then was 21 years and not 18 years as at present, and holding that such provision is for the benefit of the parent or guardian, and gives no privilege to the minor.

The law is equally well settled that a parent or guardian seeking the discharge of a minor son or ward must act seasonably—he cannot delay unduly. As was said in Ex parte Dostal, 243 Fed. 664, 669:

"He may be released from the service by a timely application of the parent or guardian having a superior right to his custody or control. But this application must be made with reasonable diligence, after the parent or guardian has acquired knowledge of the actual enlistment, and before an offense has been committed by him."

As between the United States and the minor, the enlistment of a minor over sixteen and under eighteen years is valid and the minor becomes de jure and de facto a soldier, subject to military jurisdiction. He cannot himself seek his discharge by habeas corpus and where the parent or guardian of the minor seeks his discharge, the guardian or parent must make application with reasonable diligence and before the minor has committed any offense against the military law. He is not entitled to the minor's custody prior to the expiration of his military offense. Ex parte Dunakin, 202 Fed. 290. This rule has been announced in many cases and the reason is well stated by Goff, J. in Willingham v. Boecker, 163 Fed. 696, 698, where it is said:

"To hold otherwise will make enlistment a farce, will destroy discipline, and offer a premium for desertion. It will not do to hold that he cannot be punished by court-martial for crimes committed when he was in the naval service simply because his parents did not consent to his enlistment."

In ex parte Dostal, supra, one of the late cases on the subject, this same question was presented and the court there held that:

"After an offense has been committed by the minor against the military law, and especially after he has been placed under arrest and charges have been preferred against him, it is too late for the parent or guardian to oust the jurisdiction of the military authorities by an application to the civil courts for a writ of habeas corpus."

Citing many cases.

See also Ex parte Foley, 243 Fed. 470, where the same rule is laid down.

The question is not new in this, the Fifth Circuit. It arose in the case of Re Miller, 114 Fed. 838, 52 C. C. A. 476, and was ably discussed by Shelby, J. The court held there that a minor who had enlisted without the consent of his parents, having falsely represented that he was of age, became a soldier, amenable to military jurisdiction for military offenses, and subject to release only on application of his parent or guardian, *who cannot prevent court-martial for past military offenses.* Judge Shelby, speaking for the Court, said:

"His enlistment having made the prisoner a soldier, notwithstanding his minority, he is amenable to military law just as the citizen who is a minor is amenable to the civil law. The parents cannot prevent the law's enforcement in either case. It is not reasonable that a minor, of age to enlist, who secures the honorable and responsible position of a soldier in the United States army, could abandon his colors in the face of the enemy and on the eve of battle and avoid trial and punishment for desertion by the intervention of his parents, who had not consented to his enlistment, but who had taken no step to avoid it before the soldier's arrest for desertion; or that he could endanger the army by betraying its secrets to the enemy, and not be amendable to jurisdiction, his parents objecting. We cannot approve a view that leads to such results."

The question again came before our Court of Appeals in the case of the United States v. Reaves, 126 Fed. 127, where a minor had enlisted without the consent of his parents and afterwards deserted from the navy and the ruling in Re Miller, supra, was upheld and confirmed.

The Court is familiar with the recent case of Hoskins v. Pell, 239 Fed. 279, (decided Feb. 5, 1917) where this same question again received consideration of the court. While the minor in that case was discharged from the custody of the military authorities, it was because he was under the age of sixteen years and the court took the view that the statutes (U. S. Rev. Stat. No. 1118, Comp. St. 1913, No. 1886) declared him incapable of changing his status by enlistment and that his contract of enlistment was void and the government acquired no right to his services. In this case Caldwell was over sixteen years of age at the time of his enlistment and, as was said by the Court of Appeals in this same case, Hoskind v. Pell, supra:

"It is settled that the age of one who, when he is over sixteen years and under eighteen

years of age, enlists in the army without the consent of his parents or guardian entitled to his custody and control, does not render his enlistment void and that he is subject to the jurisdiction of the military authorities for an offense committed prior to the exercise of his parents or guardian of the right to avoid his enlistment." (p. 282.)

These three decisions by the Circuit Court of Appeals for the Fifth Circuit are not only sound in principle and correct expositions of the law, but they control here and no useful purpose would be secured by citing other cases in other circuits, though it may be remarked that with one or two exceptions they follow the same ruling as our Circuit Court of Appeals.

An order will, therefore, be made refusing to discharge Caldwell and dismissing the petition filed in his behalf, but following the practice in U. S. v. Reaves, supra, the dismissal will be without prejudice.

NOTE.—*Right of Parent or Guardian to Secure Discharge of Minor from Military or Naval Service.*—In re Miller, 114 Fed. 838, 52 C. C. A. 472, Judge Shelby of Fifth Circuit refers to In re Grimly, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. ed. 636, as holding that enlistment is a contract between the soldier and the government involving a change in status, and, therefore, a minor cannot throw it off at his will. The case was one in which habeas corpus was applied for by the soldier himself.

When this case was before the Circuit Court it was there held that enlistment by one over 35 years of age was absolutely void. In re Grimley, 38 Fed. 84. And reasoning by the Supreme Court was in showing, that creation of the status applied to a person *sui juris*, though possibly not where there is insanity, idiocy, infancy, or any other disability, which, in its nature, disables a party from changing his status or entering into new relations.

But in the next following case in the same volume (In re Morrissey, 137 U. S. 157, 11 Sup. Ct. 501, 34 L. ed. 644) the court declared that a minor over 16 years of age who enlists without the consent of his parents is held to be "not only *de facto*, but *de jure*, a soldier amenable to military jurisdiction."

In McConologue's Case, 107 Mass. 154, it was said that while the contract is voidable, it is not void, and the minor may not be released therefrom while proceedings in which he has been arrested are pending before a court martial.

In the Miller case it was said that though a parent or guardian has the right to custody of a minor, he cannot be released so to obtain immunity from crime for which he is being prosecuted before a civil tribunal. So where he is being prosecuted under military law, there is jurisdiction as well in one as in the other case.

In Dillingham v. Booker, 163 Fed. 696, 90 C. C. A. 280, decided by Fourth Circuit Court of Appeals, there is announced the same view as in the Miller case, and it is stated, that if enlistment is fraudulent or by a minor, a status is created which gives jurisdiction for the trial of a military offense and "to hold otherwise will make enlistment a farce, will destroy military discipline and offer a premium for desertion. It will not do to hold that he cannot be punished by court martial for crimes committed when he was in the naval (or military) service, simply because his parents did not consent to his enlistment. The lack of such consent will necessitate his discharge from the service, but it will not absolve him from punishment for the crimes he committed when in service." See also U. S. v. Reaves, 126 Fed. 127, 60 C. C. A. 675, where it was declared that jurisdiction of a naval court having fully attached, an offender though a minor enlisting without consent of the father and voidable on the latter's demand, he cannot be released until the court shall have passed on the case or, if convicted, the minor shall have suffered the punishment imposed.

In Hoskins v. Pell, 239 Fed. 279, 152 C. C. A. 267, Fifth Circuit Court of Appeals, the Miller, Reaves, Grimley and Morrissey cases are referred, as supporting the proposition that enlistment is not void and the enlisted minor is subject to jurisdiction of military or naval authorities as to any offense committed prior to effort by parent or guardian to avoid the enlistment. But the Grimley case was relied on as holding, that this rule did not apply to an attempted enlistment of a minor under 16 years of age.

The Morrissey case: "The age at which an infant shall be competent to do any acts or perform any duties military or civil, depends wholly upon the legislature. * * * Congress has declared that minors over the age of 16 are capable of entering the military service and undertaking and performing its duties."

Grubb, D. J., dissented on the theory that: "Whatever may be the legal effect of enlistment of a minor under 16 years of age, if the minor has sufficient age and intelligence to be capable of committing the offense of desertion, has actually deserted and is in confinement awaiting trial before a military court on the charge of desertion, I do not think he should be released from military custody until the charge has been disposed of by the court having exclusive jurisdiction to try it." It seems to me that this dissent is supported by the authorities.

In Ex parte Foley, 243 Fed. 470, the offense charged was fraudulent enlistment in representing that soldier was over the age of 18 years. After charges had been preferred the mother of the enlisted man applied for habeas corpus. It was said: "It needs no argument to show, that while in the absence of any charges against this soldier, his mother might claim him from the custody and control of the army, yet, now, that a charge is made against him that he had committed a military offense, her rights must yield to the delay necessary for the trial of that charge and for the enforcement of any sentence the court martial may impose." Here, if the position taken in Hoskins v. Pell, *supra*, is true, there could not have been any offense of a military character in a mere attempt to enlist, whatever may be thought about desertion or other offense after accepted enlistment.

In Acker v. Bell, 62 Fla. 108, 57 So. 356, 39 L. R. A. (N. S.) 454, it was held that, where the constitution provided that all able-bodied male inhabitants of the state between 18 and 45 shall constitute the militia of the state and noth-

ing is said about obtaining the consent of parent or guardian of a minor, one above the age of 18 years is competent in every way to bind himself by enlistment, notwithstanding that thereby he may be taken into the Federal Service without further enlistment, as to which sort of services the lowest age for enlistment is 21 years, unless by consent of parent or guardian.

C.

JETSAM AND FLOTSAM.

NATURE OF THE ROMAN SYSTEM OF LEGAL EDUCATION.

While Scaevola, a Roman jurist of the Later Republic (100 B. C.) gave private legal instructions and while subsequent thereto the jurisconsults followed Scaevola's practice, it was not until the time of Diocletian that the state established law schools of its own with prescribed courses of study.

The law school at Beirut is the oldest in the world; she bears the proud title of "mother of law." Rome, Alexandria, Athens, and Constantinople also had law schools.

The Emperor Justinian, noted for his codification of Roman law in his Institutes, Code and Digest, was equally active in putting legal education on a sound basis. He reformed the course of study, which covered a period of five years and substituted his own Institutes as the text book for first-year students to take the place of Gains' Institute, heretofore used. This was followed by a study of the Digest and then the Code. The three Justinian law books were all the books necessary to the entire five years course of study.

The method of study was to give the student in his first year a birdseye view of *all the law*, going into no one subject thoroughly, but showing the relation of the great principles of the law to one another. Thereafter for the next three years he studies cases in the Digest—thus getting the appreciation of general principles or reasons to different states of facts. His fifth year was spent in the study of statutes, administrative law and public institutions.

In Sherman's recent work on Roman Law in the Modern World (1917), the author has this pertinent comment:

"The Roman system of first text books, then cases, has been successfully tried and tested throughout the ages. It was employed in the Roman world: First an easy and simple explanation, and afterwards one thoroughly, careful and exact," says the Emperor Justinian. And it was expressly provided that the Roman student, after a thorough drill in elementary law, should then spend much time in the later years of his course, applying inductively to the great mass of cases in the Digest, that knowledge which he had previously deductively acquired."

Judge Baldwin, of Connecticut, in 13 Yale Law, p. 11, said:

"The Corpus Juris proceeds from assertion of principles, to their application to various cases. The Institutes are a compendium of elementary law prepared by law school professors avowedly as a law school text book. They are followed by the Digest in which the same principles are more fully stated and illustrated. Then follows the statute law of recent times. Can indeed, in the nature of things, a science like law be intelligently taken up by anyone who has never been introduced to an acquaintance with its fundamental terms and conceptions?"

HUMOR OF THE LAW.

A witness in a court of a western state, illustrating his testimony by a diagram, asked for a rule. On his honor offering the "rules of court," lying near, the witness (not a lawyer) said:

"They won't do; no one could draw a straight line with them."

The court appreciated the objection.

The fact that Sir Douglas Haig attained his fifty-sixth birthday on June 19 brings to mind a story told of him a short while back.

It is, of course, well known that Sir Douglas is a soldier first, last and all the time, regarding all other professions as of quite negligible importance, a trait in his character which lends point to the anecdote.

He was, it appears, inspecting a cavalry troop, and was particularly struck with the neat way in which repairs had been made in some of the saddles.

"Very good work," he remarked to the troop sergeant major. "Who did it?"

"Two of my troopers, sir," was the reply.

"You're fortunate to have two such expert saddlers in your troop," said Haig.

"As a matter of fact, sir," was the reply, "they're not saddlers, in civil life being lawyers."

"Well," ejaculated Sir Douglas, "how men who can do work like that could have wasted their lives over law I can't imagine!"—Seattle Times.

WEEKLY DIGEST

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1. **Adverse Possession**—Occasional Entry.—Defendants' entrance upon land upon three separate occasions some years apart to remove timber will not establish an adverse title, notwithstanding their claim to have acquired title under a parol contract.—Johnson v. Gunnell, Ky., 197 S. W. 790.

2. **Attorney and Client**—Disbarment.—Attorneys' criminal conspiracy to pray upon, and appropriate funds of estates of minors, and of incompetent full-blood Indians, was a misdemeanor involving moral turpitude, and under Rev. Laws 1910, § 252, subd. 1, their licenses to practice law in state would be revoked after conviction.—In re Williams, Okla., 167 Pac. 1149.

3.——Non-Resident. — Non-resident attorney served with process in state while trying a case waives his privilege by seeking relief from order for examination before trial.—Simon v. De Gersdorff, Wis., 164 N. W. 818.

4. **Bankruptcy**—Finding by Referee.—Where the evidence is not reported, finding by the referee on the facts is conclusive on the court of bankruptcy.—In re J. W. Lavery & Son, U. S. D. C., 244 Fed. 959.

5. **Bills and Notes**—Consideration. — Note whereby maker, for value received, promised to pay his housekeeper $10,000 one year from his death, on condition that she remained as his housekeeper, which she did, was a valid debt against maker's estate.—In re Burhans' Estate, N. Y., 166 N. Y. S. 1027.

6.——Co-Partnership.—Where two defendants signed notes for rent, if they were partners one would not be released by changes in the contract, although material made by the other.—Aud v. McAvoy, Ky., 197 S. W. 824.

7.——Guaranty.—Where defendant indorsed buyer's notes and guaranteed their payment in consideration of 25 per centum of the cash payment, the guaranty was an absolute guaranty of payment, and not merely a guaranty of collection.—A. B. Farquhar Co. v. Hardy Hardware Co., N. C., 93 S. E. 922.

8. **Boundaries**—Maps as Evidence.—Copy of original map of block of city lots does not of itself prove location of line between adjoining lots, where map was not strictly accurate, and other evidence shows that a street bounding block had been since widened to include strip off block.—Ward v. Medley, W. Va., 93 S. E. 941.

9.——Rule of Property.—Rule of real property law as to determination of boundary lines through long recognition and acquiescence of adjacent landowners does not control in determining accuracy of official survey.—Gemienhardt v. Ward, Kan., 167 Pac. 1141.

10. **Bridges**—Evidence.—Where the petition alleged that plaintiff, while riding in an automobile over a draw bridge, was injured by the city's servants negligently raising the bridge, and the evidence showed that the bridge was in good repair, but was negligently raised without any warning, injuries resulted from negligence of bridge tender.—Bremer v. City of Milwaukee, Wisc., 164 N. W. 840.

11. **Burglary**—Possession of Stolen Property.—In prosecution for burglary and larceny of jewelry, evidence that defendants had in their possession when arrested, over $2,000 in diamonds and jewelry, though not identified as taken at time of burglary, held admissible.—Commonwealth v. Coyne, Mass., 117 N. E. 337.

12. **Cancellation of Instruments.**—Ratification.—The mere assignment by the purchaser of a contract for the sale and purchase of land is not a ratification of the contract which precludes a suit for rescission for fraud in its inception, but vests such right of action in the assignee.—Hart v. Adair, U. S. C. C. A., 244 Fed. 897.

13.——Rescission.—Plaintiffs, induced to exchange their property by reason of defendant's false and material representations as to area of farm taken in exchange, on discovery of fraud, after deeds had passed and occupancy had changed, might resort to equity for rescission.—Lefevre v. Chamberlain, Mass., 117 N. E. 327.

14. **Carriers of Goods**—Evidence.—In action for damage to goods plaintiff's testimony showing that the damage occurred while they remained on lines or in custody of preceding carrier before delivery to defendant, should have been excluded, and verdict directed for defendant on motion.—Copenhaver & Massey Milling Co. v. Kanawha & W. Va. R. Co., W. Va., 93 S. E. 940.

15.——Limitation of Liability.—Provision in bill of lading that any damage should be computed on basis of value of property at place and time of shipment is reasonable and valid, as it merely establishes a valuation, and does not limit carrier's liability.—Wallingford v. Atchison, T. & S. F. Ry. Co., Kan., 167 Pac. 1136.

16. **Carriers of Live Stock**—Directions as to Shipment.—Where cattle are billed to one point, but directions are given to deliver at intermediate point, and they are carried on to point billed to, shipper is entitled to damages occasioned thereby.—Virginia & S. W. R. Co. v. Sutherland, Tenn., 197 S. W. 863.

17.——Variance.—Where the petition declared upon a written contract whereby defendant undertook to transport plaintiff's live stock to Chicago, and the allegation was denied, there was a fatal variance when he failed to put the contract in evidence.—Quillen v. Minneapolis & St. L. R. Co., Ia., 164, N. W. 779.

18. **Commerce**—Burden on.—A city ordinance levying a license tax on soft drink dealers does not unconstitutionally burden interstate commerce against dealers bringing goods into the state, chiefly without orders, and there selling them, since such transactions do not constitute "interstate commerce."—Wagner v. City of Covington, Ky., 197 S. W. 806.

19.——Employe.—Ordinarily rights of litigants under federal Employers' Liability Act cannot be affected, favorably or unfavorably, by state statutes; operation of the statute thus being uniform on all litigants.—McCutcheon v. Chicago, M. & St. P. Ry. Co., Ia., 164 N. W. 774.

20. **Conspiracy**—Indictment.—To be legally charged with the crime of conspiracy a person need not have been at the place or within the state in which the conspiracy is alleged to have been committed.—Ex parte Montgomery, U. S. D. C., 244 Fed. 967.

21. **Contracts**—Estoppel. — Where plaintiff contractor, after work had been stopped because of increase demanded by laborers, resumed work in response to letters written by defendants, setting forth their interpretation of contract, plaintiff must be deemed to have acceded to defendants' interpretation, though not expressly assenting.—Ransome Const. Co. v. Von Schroeder, Cal., 167 Pac. 1144.

22.——Repairs.—Where seller of crop was to look only to amount realized after deduction of "harvesting expenses," they included repairs to necessary machinery, rent for the same, labor, etc.—Betts v. Orton, Cal., 167 Pac. 1147.

23. **Corporations**—Minority Stockholders. — A minority stockholder may compel a declaration of dividends only on clear showing of bad faith of directors in accumulating a large surplus.—Baillie v. Columbia Gold Mining Co., Ore., 167 Pac. 1167.

24.——Promoters.—Promoters of corporation must provide it with board of directors, which in dealing with them will act independently for the corporation, and must also make a full disclosure to the directors of their interest and of facts as to property they propose to sell to corporation.—Goodman v. White, N. C., 93 S. E. 906.

25.——Sale of Securities.—Defendant, who sold stocks and bonds, and retained them for safe-keeping and as collateral for loans to the buyer, and disposed of them for more than his claim, held accountable to owner for amount received, less amount loaned thereon.—Palmer v. Parmalee, Neb., 164 N. W. 705.

26. **Covenants**—Building Restrictions. — Restrictive covenants in a deed that no dwelling should be erected on premises containing less than six rooms or be located within 24 feet from street lines, did not apply to erection of business block thereon.—Kiley v. Hall, Ohio, 117 N. E. 359.

27.——Lots in a Block.—Purchaser of a lot in an allotment by deed containing restrictions as to use of lot was not chargeable from that fact alone with notice that like restrictions were contained in deeds of other lots in the allotment.—Kiley v. Hall, Ohio, 117 N. E. 359.

28.——Running With Land.—Covenant, in deed of railroad right-of-way, that it should be fenced and forever maintained by grantor, his heirs, personal representatives and assigns, runs with land.—New York Cent. & H. R. R. R. v. Clarke, Mass., 117 N. E. 322.

29. **Customs and Usages**—Evidence.—If there is evidence of a customary meaning for the words "straight time" in an employment contract, its weight is for the jury.—Cormier v. H. H. Martin Lumber Co., Wash., 167 Pac. 1105.

30. **Damages**—Evidence. — Evidence as to profit in handling and marketing slag at another point held not admissible to show plaintiffs' loss of profits from defendant's breach of contract to let plaintiffs have slag for keeping it out of defendant's way.—Davis v. Carnegie Steel Co., U. S. C. C. A., 244 Fed. 931.

31. **Deeds**—Suppression of.—A grantor having parted with his title by a good and sufficient deed, duly delivered, cannot of his own accord and without the consent of the party in interest, destroy or suppress his deed, and thereby reinvest himself with the title so conveyed.—Hays v. Dean, Ia., 164 N. W. 770.

32. **Drains**—Easement.—Where an easement was granted to construct a drainage ditch by widening and deepening a natural channel, if it was necessary to accomplish the work to destroy a bridge over the channel, the deed contemplated such destruction.—Bice v. Brown, Wash., 167 Pac. 1097.

33. **Executors and Administrators**—Married Woman's Act.—Where a husband sued for damages to the rental value of an estate by the entireties, prior to the Married Woman's Emancipation Act of 1913, money recovered in such suit was on a personal demand, and after his death should go to the husband's personal representative, and not to wife.—Hux v. Russell, Tenn., 197 S. W. 865.

34. **Explosives**—Injury to Child.—Leaving a small box of dynamite caps in a granary on a plate between nine and ten feet from the floor, was not of itself such negligence as to render defendant liable for injury to child while playing with the caps.—Peterson v. Martin, Minn., 164 N. W. 813.

35. **Extradition**—Fugitive from Justice.—A person cannot be extradited as a fugitive from justice unless physically present in the state in which the crime is alleged to have been committed when it was committed.—Ex parte Montgomery, U. S. D. C., 244 Fed. 967.

36. **Fences**—Liability of Owner.—Landowner, who maintained fence entirely on his property, held not liable to plaintiff, walking on sidewalk, who slipped on ice and snow, and in falling backwards put out her hand, which struck defendant's fence, and was injured.—Noyes v. Carr, Mass., 117 N. E. 350.

37. **Fires**—Locomotives.—Where fire damaging plaintiff's timber lands originated by sparks from engine of independent contractor working for lumber company falling on right-of-way belonging to lumber company, lumber company was liable.—Bryant v. Sampson Lumber Co., N. C., 93 S. E. 926.

38. **Fraud**—Damages.—In suit to rescind exchange of properties for defendants' fraud, where rescission could not be had, measure of damages was difference between actual value received and what value would have been, had representations been true.—Lefevre v. Chamberlain, Mass., 117 N. E. 327.

39.——Duress.—Plaintiff, compelled to convey his property by duress, had right to pursue one of two remedies, either to bring suit in equity to cancel and set aside the instruments on the round of fraud and duress, or an action at law for damages.—Smith v. Blakesburg Sav. Bank, Ia., 164 N. W. 762.

40. **Fraudulent Conveyances**—Insolvency. — Where grantor of farm, at time of conveyance, owned life estate in business property yielding him annually more than $7,000, his only liability being a tax of less than $2,400, not yet demanded or payable, such grantor was not insolvent when conveyance of farm was made.—Pitt v. Brouthers, Mass., 117 N. E. 345.

41. **Guaranty**—Lien.—For bank, without consent of guarantor, to grant borrower's request to withhold from record bill of sale on his goods, taken by bank's cashier for benefit of bank, and permit him to dispose of property, held to release guarantor only to amount of injury he sustained thereby, although such conduct was violation of bank's duty to preserve lien of bill of sale to be turned over to guarantor on his paying note.—Central State Bank of Cedar Rapids v. Ford, Ia., 164 N. W. 754.

42. **Guardian and Ward**—Appointment.—Appointment of child's maternal aunt as his guardian, upon application of his maternal grandfather, will not be set aside on claim of paternal grandmother that she has greater rights.—In re Reimenschneider, Ia., 164 N. W. 736.

43. **Habeas Corpus**—Construction of Order.—Order that child "be and remain a ward of the court, and * * * is hereby committed to the custody of, * * * there to remain subject to the further order of the court," is no permanent order in sense that it would prevent change of custody by another department of court.—State v. Mackintosh, Wash., 167 Pac. 1090.

44.——Evidence.—In habeas corpus governor's extradition warrant makes a prima facie case and places on the prisoner the burden of proving by practically conclusive evidence that he is not a fugitive from justice.—Ex parte Montgomery, U. S. D. C., 244 Fed. 967.

45.——Extradition.—A person held on an executive warrant for extradition to another state may test the legality of his detention under Article 4, § 2, of the federal Constitution by habeas corpus proceedings in a federal court.—Ex parte Birdseye, U. S. D. C., 244 Fed. 972.

46. **Hospitals**—Respondeat Superior.—Where plaintiff for her operation engaged accommodations at a prive hospital, also contracting for nursing before, during and after her operation, and one of the operating nurses stole a ring from plaintiff's hand while plaintiff was under the influence of ether, there was a violation by the hospital of its duty toward the plaintiff under its contract with her.—Vannah v. Hart Private Hospital, Mass., 117 N. E. 28.

47. **Husband and Wife**—Wrong by Husband. —Where a husband acting as a member of the drainage board, committed a tort by piling logs upon the right-of-way not authorized by the grant of easement, his wife was not liable.—Bice v. Brown, Wash., 167 Pac. 1097.

48. **Indemnity**—Indemnity Company.—Under an agreement to indemnify a surety company "from any loss whatsoever * * * by reason of the execution of the bond herein applied for," the obligor was not liable for the premium which the principal failed to pay.—New England Equitable Ins. Co. v. Empire Athletic Club of America, N. Y., 166 N. Y. S. 1025.

49. **Indictment and Information**—Demurrer. —Indictment charging illegal sale of liquor in "the store or warehouse" of defendant is not bad as charging the place in the alternative, it appearing it was intended to charge the sale at a single place, known as the store or warehouse.—State v. Li Fieri, Del., 102 Atl. 77.

50.——Sufficiency.—Though the complaint did not mention the name of the accused, it was sufficient where the warrant named the accused, referred distinctly to the complaint, and was physically annexed thereto.—State v. Poythress, N. C., 93 S. E. 919.

51. **Innkeepers**—Insurers. — Under St. 1915, §§ 1725, 1725a, 1726, guest, who deposits bag containing money and rings with hotel keeper for storage in his safe, held entitled to recover full value, when the goods were stolen.—Busley v. Hotel Wisconsin Realty Co., Wisc., 164 N. W. 826.

52. **Insurance**—Death by Intentional Means. —If death of insured under mutual insurance certificate was caused by his act intentionally done in lifting cotton bales in manner in which he intended, his death was not caused by accidental means.—Pledger v. Business Men's Acc. Ass'n of Texas, Tex., 197 S. W. 889.

53.——Designation of Beneficiary.—Where the laws of a union required designation of beneficiary to be in writing and witnessed, a designation in writing of the mother of insured, but unwitnessed when accepted by union was valid, and the wife of the member whom he subsequently married, was not entitled to the fund under provision that in the absence of designation the wife should be the beneficiary.—Zenger v. Cigarmakers' Union, No. 224, of Cigarmakers' International Union of America, Utah, 167 Pac. 1174.

54.——Evidence.—Evidence that plaintiff employer notified defendant liability insurance company of accident to employe one month thereafter, but as soon as he knew employe intended making claim, and that defendant was notified when suit was started, and was represented at trial, made jury questions whether provisions requiring immediate notice of injury and forwarding of summons to insurer were complied with or waived.—Hunt v. Fidelity & Casualty Co. of New York, N. C., 93 S. E. 900.

55.——Stipulation in Policy.—Provision in mutual fire insurance policy that it was condi-

tion of contract that total insurance permitted, including amount of policy, was limited to $7,600, held a stipulation to be read with provision that policy should be void if insured had or should make other insurance without company's assent.—Smith v. Middlesex Mut. Fire Ins. Co., Mass., 117 N. E. 331.

56. **Intoxicating Liquors** — Evidence. — A charge of illegal sale of intoxicating liquor is sustained by proof of sale of "beer" without any further description or testimony that it was intoxicating.—State v. Li Fieri, Del., 102 Atl. 77.

57.——Illegal Sale.—In prosecution for illegal sale of intoxicating liquors by the barrel, a witness could testify that shortly before the sale there was no barrel of liquor at the place at which defendant delivered it, as preliminary to showing that after the alleged sale there was a barrel at such place.—D'Amico v. State, Del., 102 Atl. 78.

58.——Indictment and Information.—Information charging that defendant unlawfully and feloniously sold to a named minor a pint of whisky for a certain price, contrary to statute, held sufficient to give court jurisdiction to render judgment against accused.—Wilson v. State, Okla., 167 Pac. 1155.

59.——Nuisance.—Liability of one alleged to maintain liquor nuisance to injunction must be governed under law as it stood when suit was brought, unaffected by statute which became effective three months thereafter.—Civic Improvement League of Toledo, Ia., v. Hanson, Ia., 164 N. W. 752.

60. **Landlord and Tenant**—Subletting.—Where a lease, as originally prepared, contained a covenant against subletting and a condition authorizing the lessor's re-entry in case of a subletting, and the parties erased the covenant, but left the condition, the condition remained in force.—Zotalis v. Cannellos, Minn., 164 N. W. 807.

61.——Tenancy at Will.—Where a landlord terminates a tenancy at will of city lots, the tenant is entitled to growing crops as against landlord or subsequent lessee with knowledge of first tenancy.—Commonwealth v. Gallatta, Mass., 117 N. E. 343.

62. **Larceny**—Intent.—Taking of motor vehicle and operating it, without intention of appropriating it permanently to use of person so taking and operating it, is not larceny, and cannot be punished as such.—State v. Boggs, Ia., 164 N. W. 759.

64. **Mandamus**—Mandatory Injunction.—Mandatory injunction is available to compel election commissioners to issue certificate of nomination, though same purpose might be served by writ of mandamus; plaintiff having election as to which remedy he will pursue.—Hays v. Combs, Ky., 197 S. W. 788.

63. **Libel and Slander**—Privileged Communication.—Where a communication is made touching a matter in which the party making it has an interest to another having a corresponding interest, it is privileged if made in good faith and without malice.—Fahey v. Shafer, Wash., 167 Pac. 1118.

65. **Master and Servant**—Accident. — Under Workmen's Compensation Law (Gen. St. 1913, §§ 8203, 8230), providing compensation for injury caused by "accident," defined as an unforseen event happening suddenly and producing injury to physical structure of body, typhoid fever from drinking infected water furnished by employer's factory is not an accident.—State v. District Court, Rice County, Minn., 164 N. W. 810.

66.——Assumption of Risk.—If fall of deceased employe was due to slippery, unguarded and dangerous condition of trestle and ladder which he had to use in his work, his injury was caused by risk accident to work he was employed to do.—In re Uzzio, Mass., 117 N. E. 349.

67.——Breach of Duty.—Mere presence of weeds on right-of-way is not breach of railroad's duty to furnish safe place to work to section hand, whose duties involve care and maintenance of right-of-way.—McCutcheon v. Chicago, M. & St. P. Ry. Co., Ia., 164 N. W. 774.

68.——Discontinuance of Employment. — Under an employment contract on straight time under averment and evidence of custom that straight time included pay for shut-downs, plaintiff's hiring did not cease until discontinued by himself or defendant.—Cormier v. H. H. Martin Lumber Co., Wash., 167 Pac. 1105.

69.——Employment of Minor.—Violation of Acts 1911, c. 57, § 5, requiring that one employing minors between 14 and 16 years of age keep a sworn statement on file as to the child's age, is negligence rendering the master liable for injuries.—Fulton Co. v. Massachusetts Bonding & Ins. Co., Tenn., 197 S. W. 866.

70.——Employer's Liability Act.—Where employe of furniture company engaged in cleaning and oiling two motors attempted to ascend a ladder leading to the motors, and staggered and fell, and was taken home, and remained there ill until he died, his death was an accident, as defined by Employer's Liability Act, § 52.—Young v. Western Furniture & Mfg. Co., Neb., 164 N. W. 712.

71.——Evidence.—Facts respecting employe's injury, sustained while dumping hot ashes into pit partially filled with water, held not to show negligence, in the absence of any suggestion that this method of disposing of the ashes was not proper and usual.—Mammott v. Worcester Consol. St. Ry. Co., Mass., 117 N. E. 336.

72.——Hours of Service Act.—Switch tenders, who regularly receive yardmaster's telephone orders and execute them by word or signal to trainmen, and by manipulating switches, held within proviso of Hours of Service Act, § 2, limiting to 9 hours service of employe who by telephone receives orders for train movements.—Chicago & A. R. Co. v. United States, U. S. C. C. A., 244 Fed. 945.

73.——Hours of Service Act.—Under Hours of Service Act, § 3, delay caused by derailment will not excuse railroad company from keeping its employes on duty for more than 16 hours, where it did not appear that there was high degree of diligence exercised after accident occurred.—Indiana Harbor Belt Ry. Co. v. United States, U. S. C. C. A., 244 Fed. 943.

74.——Joint Tortfeasors.—Where a master and servant act together in publishing a libel, they may be sued jointly or separately, as in the case of other joint tortfeasors.—Morse v. Modern Woodmen of America, Wisc., 164 N. W. 829.

75.——Workmen's Compensation Act.—Laws 1915, c. 209, § 8, limiting the time to recover under Workmen's Compensation Act to one year after occurrence of injury, does not apply to claims that accrued before passage of such statute.—State v. District Court, St. Louis County, Minn., 164 N. W. 812.

76.——Recovery of Wages.—In proceeding under Workmen's Compensation Act, there is no error in considering appearance of employe in passing upon question whether his seeming intelligence, health and aptitude for work would have been likely to have led to an increase in wages, if injury had not been received, under St. 1915, c. 236.—In re Gagnon, Mass., 117 N. E. 321.

77.——Workmen's Compensation Act.—A city, hiring from another a team and driver to carry material from one place to another as its servants might direct, the driver being paid by the owner of the team, is not liable under the Workmen's Compensation Act (St. 1911, c. 751, and St. 1913, c. 807) for such servant's death by being thrown from the cart.—In re Clancy, Mass., 117 N. E. 347.

78. **Mechanics' Liens**—Materialman.—A materialman is chargeable with notice of the conditions of the contract between the owner and the contractor.—Garrison Grain & Lumber Co. v. Farmers' Mercantile Co., Ia., 164 N. W. 791.

79. **Monopolies**—Anti-Trust Act.—Action under Sherman Anti-Trust Act, § 7, for treble damages for injuries to person or property by reason of unlawful monopoly, is one for personal wrong, and sounds in tort.—Imperial Film Exch. v. General Film Co., U. S. D. C., 244 Fed. 985.

80. **Municipal Corporations**—Assessment. — Where worthlessness of street pavement was due to city's negligence, held that property owners, assessed for the original pavement and for its resurfacing, had a right of action for the damages caused by the second assessment.—Crowley v. City of Milwaukee, Wisc., 164 N. W. 833.

81.——Defect in Street.—Inequality in the surface of sidewalk, of about 1¾ inches, at the point where the corners of the concrete blocks of the walk came together, held not an actionable defect.—Van Der Blomen v. City of Milwaukee, Wisc., 164 N. W. 844.

82.——Discretion.—In exercising sound discretion, if municipal authorities adopt a method of construction and use materials for covers for catch basins, not inherently dangerous, the municipality is not liable for injuries; but they must maintain them in a reasonably safe condition for public travel.—City of Covington v. Rosenberg, Ky., 197 S. W. 786.

83.——Highway.—That driver of automobile violated law in attempting to pass on wrong side did not show contributory negligence, unless she ought to have appreciated that her conduct might result in injury.—Mahar v. Lochen, Wisc., 164 N. W. 847.

84.——Registration of Automobile.—Under St. 1909, c. 534, § 2, as amended by St. 1912, c. 400, registration of automobile by buyer under conditional sale held not invalid, so as to impose liability for collision as in case of unregistered automobile.—Hurnanen v. Nicksa, Mass., 117 N. E. 325.

85. **Principal and Agent** — Commission. — Where defendant, acting through an agent, sold automobile tires to plaintiff, a payment retained by a sub-agent as commission might be recovered; the tires being defective and practically worthless.—Farnham v. Akron Tire Co., Wash., 167 Pac. 1081.

86. **Principal and Surety**—Co-surety.—Where levy was made on co-surety's property, and afterwards either lien was discharged or levy released by act of creditor, other co-surety was released to extent of debt equitably due from him whose property was released.—Darland v. First Nat. Bank of Springfield, Ky., 197 S. W. 826.

87. **Public Service Corporation**—Abandonment.—That plaintiff appropriating water for irrigation purposes at one time contemplated erection of two additional reservoirs did not show abandonment of the original scheme.—Pleasant Valley Irrigation & Power Co. v. Okanogan Power & Irrigation Co., Wash., 167 Pac. 1122.

88. **Railroads**—Implied Authority.—An assistant engineer, with power to hire and discharge men and hire physicians, in the absence of company physicians, to care for injuries, had no implied authority to hire a physician for a servant injured while not at work.—Carson v. Chicago, M. & St. P. Ry. Co., Ia., 164 N. W. 747.

89.——Use of Facilities. — Where railroad granted right to use part of its track, station facilities, etc., the grantee to have no right to take business from grantor's stations, grantee had no right to use switch track on grantor's right-of-way, connecting its main track with coal company's mine tracks, and which had been built for coal company's convenience.—Kanawha & M. Ry. Co. v. Public Utilities Commission of Ohio, Ohio, 117 N. E. 353.

90. **Sales**—Acceptance. — One who kept a piano for three months with a knowledge of defects, in violation of warranty, and made payments, waived the defects, under St. 1915, § 1684t48, relating to acceptance of goods.—J. B. Bradford Piano Co. v. Baal, Wisc., 164 N. W. 822.

91.——Contract for Delivery.—No recovery can be had for breach of a contract to deliver wheat, where complaint which alleged no special damages did not allege that at date of breach market price was in excess of contract price; for damages must be measured by date when contract was to be performed.—Union Warehouse & Elevator Co. v. Baumann, Wash., 167 Pac. 1100.

92.——Counterclaim.—Where a buyer elected to accept articles, he cannot counterclaim for damages for delay in delivery in an action for price.—United Iron Works v. Wagner, Wash., 167 Pac. 1107.

93.——Waiver.—Under contract of sale giving right of action for failure to perform any condition, failure to make initial payment held to warrant suit, without waiting for breach as to any of the specified installments.—Jones-Rosquist-Killen Co. v. Nelson, Wash., 167 Pac. 1130.

94.——Warranty.—Where plaintiff sold a stallion to defendant under guaranty, and the horse died, defendant was entitled to cancellation of his notes only if the horse were diseased when purchased and his death resulted therefrom, or from conditions constituting a breach of guaranty.—Singmaster & Son v. Robinson, Ia., 164 N. W. 776.

95. **Street Railroads**—Barriers on Street.—Where barriers erected by city indicated that street had been temporarily withdrawn from public travel by reason of repairs, street railway company is not bound to anticipate presence of pedestrians on such street, or that they will stumble over such paving and fall in front of car.—Conners v. Worcester Consol. St. Ry. Co., Mass., 117 N. E. 334.

96. **Telegraphs and Telephones**—Minimizing Damages.—After error in transmission of telegram resulting in sale of apples to consignee at price lower than that intended, it was sender's duty to minimize his damages by accepting consignee's subsequent offer to settle at higher price than that paid.—Bentley v. Western Union Telegraph Co., Wash., 167 Pac. 1127.

97. **Trusts**—Resulting Trust. — Where the grantee, representing his deed was lost, had a new deed made, naming his wife as grantee, he could not question such deed without assuming burden of showing resulting trust, hence in suit to quiet title as against his heirs, she need only show her title, and need not negative the trust.—Hays v. Dean, Ia., 164 N. W. 770.

98. **Wills** — Ambiguity. — On testamentary trustee's bill for instructions as to disposition of property, letter, found among testatrix's papers, constituting statement to executors of intention to make change in will, held inadmissible; there being no ambiguity in the will.—Taber v. St. Peter's Parish, Springfield, Mass., 117 N. E. 339.

99.——Principal Beneficiary.—A trustee of testamentary trusts, having no pecuniary interest in the estate, except the right to receive reasonable compensation for his services, held not the "principal beneficiary" in the will, within the meaning of Gen. St. Kan. 1909, § 9787.—Bauer v. Meyers, U. S. C. C. A., 244 Fed. 902.

100.——Undue Influence.—That testatrix's last will diminished legacy made by previous will, or changed amount left for care of cemetery lot, had no tendency to prove undue influence in absence of other evidence sufficient to overcome volition and free agency of testatrix.—Appeal of Norton, Me., 102 Atl. 73.